



# U. S. DEPARTMENT OF JUSTICE

**STATEMENT**

**OF**

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**BEFORE THE  
SUBCOMMITTEE ON THE CONSTITUTION  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**CONCERNING**

**"OVERSIGHT OF THE FEDERAL DEATH PENALTY"**

**PRESENTED ON  
JUNE 27, 2007**

**Statement of Barry Sabin  
Deputy Assistant Attorney General, Criminal Division  
Before the Subcommittee on the Constitution  
Committee on the Judiciary  
United States Senate  
June 27, 2007**

Thank you Mr. Chairman and Members of the Committee. I am pleased to appear before you today to testify about the Department of Justice's implementation of the Federal death penalty statutes. The Justice Department relies upon rigorous procedural safeguards and highly experienced personnel to ensure a uniform decision-making structure that is respectful to victims and defendants.

In connection with my testimony today, I will emphasize the paramount importance the Department attaches to the review of capital cases and key elements that define this review process. These elements are: (1) the capital case review process is centralized and the decision in every case is ultimately made by the Attorney General of the United States; (2) the review of a capital matter is designed to respect the Federal law; (3) the review of a capital matter treats each defendant as an individual, even as it evaluates the case within a national framework; (4) discrimination and bias play no role in the capital review process; and (5) each review of a capital matter respects victims' and defendants' rights.

## **I. Background**

Pursuant to the Federal Death Penalty Act of 1994, as codified in Title 18, United States Code, Section 3591 *et seq.*, and as most recently updated on March 6, 2006 pursuant to the USA PATRIOT Improvement and Reauthorization Act of 2005, Congress has authorized the Department of Justice to seek the death penalty for more than 50 Federal offenses including murder within federal jurisdiction, treason or major violent drug trafficking activities. Consistent with Congressional intent, the Department of Justice treats capital cases as matters of paramount importance. The Justice Department strives to enforce Federal capital sentencing laws fairly and even-handedly, uninfluenced by the locations of prosecutions or the races or ethnicities of defendants and victims.

With the goal of fair and consistent application in mind, in June 2001, the Justice Department implemented a revised protocol (hereinafter protocol), which further harmonized the capital review process. This protocol for Federal death penalty case review appears in Title 9-10.000 of the United States Attorneys' Manual. Under this United States Attorney Manual provision, the Department instituted policies and procedures to ensure that the government fairly and consistently seeks the death penalty in cases with appropriate factual support for potential death verdicts.

Recently, the Department has focused on expediting the review of certain categories of offenses for which a decision to seek the death penalty is highly unlikely and on facilitating and encouraging timely submissions through centralized monitoring of potential capital cases. These

revisions to the protocol will further ensure fairness and address the concerns expressed by the Federal judiciary about the cost of providing counsel with capital expertise during the review process. In addition, by encouraging timely submission of cases for review, the revisions reduce the need to delay judicial proceedings to accommodate the review. The proposed revisions will clarify existing procedures, create mechanisms to more closely manage cases, and expedite decision-making for certain categories of cases in which the Justice Department will not likely seek the death penalty.

## **II. Capital Case Review: Personnel and Process**

### **A. The Review Process Is Conducted By Experienced Prosecutors**

The Department relies upon a core group of prosecutors experienced in capital litigation to effectuate the Department's protocol. These veteran prosecutors are located in the Criminal Division's Capital Case Unit and the Attorney General's Review Committee on Capital Cases (the "Committee"). These two independent entities are integral in ensuring the proper review of potential death penalty cases.

The Capital Case Unit is comprised of seven career attorneys (who have been led by the same career Chief since the Unit was formed in 1998). The Capital Case Unit provides the legal and factual analysis underlying the protocol review of death penalty eligible offenses. The Capital Case Unit (1) facilitates thorough review of death penalty eligible offenses for which the Attorney General must decide whether to seek the death penalty; and (2) provides informed expert assistance to the United States Attorneys' Offices prosecuting capital cases to the extent allowed by existing resources. It also provides training to individual districts and at the National Advocacy Center on the prosecution of death penalty cases. In that context, its instructors discuss the demands associated with capital litigation (for example, investigation relevant to the punishment phase). The Capital Case Unit also provides guidance on a case-by-case basis. At the request of individual districts, and as time and resources allow, Capital Case Unit attorneys assist U.S. Attorneys by providing or drafting documents or participating at trial or in post-conviction litigation.

The Committee is drawn from the United States Attorneys' Offices, the Criminal Division, and the Office of the Deputy Attorney General. Committee members are selected based on their experience, abilities to synthesize facts and to fairly and uniformly evaluate arguments regarding the application of the Federal death penalty statutes. The Committee has no policy-setting function and only gathers information as required to fully consider individual cases.

The relatively small size of the Committee helps ensure fairness and consistency in the application of Federal death penalty laws. The Committee has two standing members, a Deputy Assistant Attorney General or other senior attorney experienced in capital litigation from the Criminal Division and the career Chief of the Capital Case Unit. Additional Committee members are assigned on a rotating basis from two pools. The first pool includes selected

attorneys in the Office of the Deputy Attorney General; the second pool includes Assistant United States Attorneys with capital trial experience from approximately half a dozen United States Attorneys' Offices around the country. One representative from each pool is named to the Committee for every case.

The Committee meets to consider every case for which the U.S. Attorney requests authorization to seek the death penalty and every case in which, based on the U.S. Attorney's protocol submission and an analysis prepared by an attorney in the Capital Case Unit, an assigned Committee member requests a conference. Under the United States Attorney's Manual provision, United States Attorneys' Offices submit all potential death penalty cases for review by the Committee. The Committee's central role and national perspective further the Department's goal of fairly and uniformly administering the Federal death penalty.

## **B. The Justice Department Review Procedures For Capital Cases Are Transparent, Thorough, and Uniform**

### **1. Procedural Safeguards**

The Department designed its death penalty review process to ensure the fair and consistent application of the nation's capital sentencing statutes. The Department strictly adheres to this protocol because of the unparalleled degree of transparency it affords to the reviewing attorneys and the attorneys litigating for both the government and the defense. Such openness optimizes the quantity and quality of information available to the officials who recommend or decide whether the government will seek the death penalty in any given case. In every potential capital case, the Committee recommends to the Deputy Attorney General and the Attorney General whether to seek the death penalty, but the final determination rests solely with the Attorney General.

### **2. The Review Process is Race and Ethnicity Neutral**

The Attorney General, the Committee, and the other Department personnel involved in reviewing protocol submissions are not advised of the race or ethnicity of defendants or victims. Protocol submissions from U.S. Attorneys are forwarded to the Capital Case Unit through the office of the Assistant Attorney General for the Criminal Division. The Capital Case Unit's clerical staff sanitizes the submissions of any references to the races of victims or defendants before the cases are assigned to a unit attorney. Though staff separately collects demographic data, the Department's attorneys are not provided with that information unless defense counsel chooses to submit race-identifying information about their clients. The result is a review process that is blind to the race and ethnicity of victims and defendants.

The Department of Justice September 2000 Statistical Survey noted that there was no evidence that any U.S. Attorney's office had engaged in discrimination or bias in charging decisions. Following this statistical study, the Justice Department contracted the RAND Corporation to undertake further analysis of the Justice Department's capital case statistics. In 2006, the RAND Corporation published a Technical Report that concluded that decisions to seek

the Federal death penalty through 2001, “were driven by heinousness of crimes rather than race.”

Despite an absence of discrimination or bias as of 2001, the Department adopted additional procedural safeguards to forestall the possibility that biases might develop. U.S. Attorneys’ Offices are required to seek review of all cases in which the facts alleged in the indictment could support a death-eligible charge, rather than just those cases in which a death-eligible offense is charged. The protocol also requires U.S. Attorneys to submit requests not to seek the death penalty for cases in which they propose to enter plea agreements with capital-eligible defendants.

### 3. The Committee’s Decision-Making Process and Defense Counsel’s Participation

When the Committee convenes a conference, its recommendation is determined by majority vote. The recommendation and the supporting rationales are set forth in a memorandum prepared by the Capital Case Unit and circulated to the Committee for approval and revisions. Dissenting Committee members have discretion to include the minority viewpoint in the memorandum, which, in all events, summarizes the defense position and any Committee responses. The Committee memorandum, the U.S. Attorney’s submission, all defense submissions, and any other pertinent documents are forwarded to the Deputy Attorney General and the Attorney General. The review is based on all the available pertinent documents.

There are multiple opportunities for defense counsel to provide information favorable to their client and argue against the Government seeking the death penalty. The protocol requires any U.S. Attorney, or his or her representative, considering whether to seek the death penalty, to meet with defense counsel. Any written submission made by defense counsel to the U.S. Attorney is forwarded to the Department to be considered by the Committee and all subsequent reviewers. Defense counsel may make additional written submissions to the Committee and a decision to seek the death penalty is never made without affording defense counsel the opportunity to personally appear before the Committee. If at the time of the Committee conference defense counsel expect to obtain, but are not yet in possession of additional relevant information, the Committee will allow additional time for submission of that information if possible under the Court’s schedule. In addition, the Committee always informs defense counsel that the Committee will consider, additional information favorable to the defendant, even if the Attorney General has already made a decision adverse to their client’s interests. The additional information may provide a basis for the Committee to recommend reconsideration of the decision to seek the death penalty. Further, it must be emphasized that the Committee considers the case of each death penalty eligible defendant and the mitigating circumstances apparent from the record or identified by defense counsel. Review of death penalty submissions remains thoughtful and substantive, even after the Committee has made a recommendation.

The death penalty protocol also advises the United States Attorney to consult with the family of the victim concerning the decision whether to seek the death penalty and to include the views of the victim's family concerning the death penalty in any submission made to the Department. The victim’s family is notified by the U.S. Attorney of all final decisions regarding the death penalty.

#### 4. Participation of the Deputy Attorney General and Attorney General

As previously noted, the Committee's recommendation memorandum, the U.S. Attorney's submission, any defense submission, and any other pertinent documents are forwarded to the Deputy Attorney General and the Attorney General. The documents (such as the United States Attorney memorandum, the Committee memorandum, indictment, defense submissions, death penalty evaluation forms) are organized in an indexed "AG Notebook." The notebook is initially received by the Office of the Deputy Attorney General, where it is assigned to a staff member who did not serve on the Committee for the case. The staff member prepares a brief analysis and recommendation, which along with the AG notebook is forwarded to the Deputy Attorney General's Chief of Staff, who makes a separate recommendation to the Deputy Attorney General. The Deputy Attorney General's recommendation is also conveyed to the Attorney General in the AG Notebook. In the Attorney General's office, a staff member reviews the recommendations of the U.S. Attorney, the Committee and the Deputy Attorney General, and presents the case to the Attorney General. The Attorney General's decision is memorialized in a letter addressed to the prosecuting U.S. Attorney. The letter states whether the Attorney General has authorized the U.S. Attorney to seek the death penalty.

In an effort to secure fair and appropriate decisions in every case, the review process permits and encourages communication between the U.S. Attorney's Office and the reviewing officials within the Department. The Committee's recommendations are communicated to the prosecution team. Certain recommendations may prompt further discussion between the Committee and the prosecutors, who have a continuing right to supply the Committee with supplementary documents and information in support of their position. The process also permits a request for reconsideration of a recommendation to seek the death penalty at any time throughout the pre-trial and trial litigation. The U.S. Attorney's Office typically has multiple opportunities to present its position to the Deputy Attorney General and various members of his staff.

#### **C. Capital Case Review Provides Each Defendant With Individualized Consideration, Even as it Permits Each Case To Be Assessed Within a National Framework**

The Justice Department's review of capital cases is not aimed at maximizing or minimizing capital cases; it aims to apply the most faithful reading of Federal law to cases. Current Federal law authorizes capital punishment for a number of crimes and, pursuant to statute, Congress has limited the discretion of the Department and juries to seek or impose the death penalty. Unless specified intent factors and aggravating circumstances can be found beyond a reasonable doubt, the death penalty is not authorized. The Attorney General will not authorize seeking the death penalty unless these statutory requirements are met. If they are met, the Department must follow the law and consider the death penalty as a possible sanction for these crimes. By definition, Federal law does not vary from State to State. As a result, national consistency would be impossible if decisions about whether to seek the death penalty turned on

State or local approaches to the death penalty. The Federal government has an obligation to evenhandedly enforce Federal law, and the Department of Justice's capital case review process ensures this outcome.

The review allows each potential capital case to be viewed in context of all other such cases, protecting against arbitrary decision-making. The review also ensures that individual characteristics are highlighted during this review; the Attorney General's decision turns on what the defendant has done and the relevant aggravating and mitigating circumstances. Factors that are arbitrary, such as race, ethnicity, gender, or religion, are not considered. In this way, the Justice Department is able to effectuate Congress's intent that the death penalty be sought against the worst offenders, while simultaneously respecting statutory and constitutional principles that all defendants must be given individualized consideration. In short, the Attorney General will not authorize seeking the death penalty against a defendant unless he believes that such a sentence is both authorized under Federal statute, and is consistent with constitutional principles.

### **III. Conclusion**

The Department has established rigorous safeguards to ensure that capital cases are reviewed in a fair, transparent and uniform manner. We have dedicated tremendous efforts and resources to ensure fairness in Federal capital litigation. I appreciate the opportunity to testify today and I look forward to your questions.